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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PARITOSH PATEL

Appeal 2015-006808
Application 11/967,155¹
Technology Center 2400

Before ST. JOHN COURTENAY III, THU A. DANG, and
LARRY J. HUME, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant has filed a request under 37 C.F.R. § 41.52 (hereinafter "Request") that we reconsider our Decision of October 31, 2016 (hereinafter "Decision"), in which, *inter alia*, we affirmed the rejections of claims 1 through 7 under 35 U.S.C. § 103 as being unpatentable over various combinations of Minnich, Meek, and Neale. *See* Decision 10–11; *and see* Request 2–5.

We have reconsidered our Decision, in light of all of Appellant's arguments in the Request, and are not persuaded that we misapprehended or

¹ According to Appellant, the real party in interest is IBM Corp. App. Br. 2.

overlooked any points in rendering our Decision. We decline to change or modify our prior Decision for the reasons discussed *infra*.²

BACKGROUND³

Appellant contends the Board misapprehended or overlooked certain points of argument made by Appellant. Request 1 *et seq.* In particular, Appellant contends: (1) "[A]t least one finding of the Honorable Board appears to be unsupported by substantial evidence . . ." (Request 2); and (2):

[T]he Honorable Board has determined that the claimed 'network interface' is properly compared to the 'radio receiver' of Minnich . . . [and i]t is with respect to [this] that Appellant[] seek[s] rehearing on the basis that the Honorable Board has overlooked a core argument of Appellant[] set forth in the Reply Brief on the basis that such argument is based upon new evidence as stated at footnote 4 of page 6 of the Decision.

Request 4.

² We note, in the Final Action, the explicit statement of the rejection omits mention of claim 5. Final Act. 4. However, the Examiner addressed, in detail, the rejection of claim 5 under § 103 over the combination of Minnich and Meek. Final Act. 7–8. Appellant did not make any argument or otherwise point out this minor oversight by the Examiner, such that we find harmless error concerning the rejection of claim 5 in our Decision.

³ Our Decision on Rehearing relies upon Appellant's Request for Rehearing ("Request," filed Jan. 3, 2017); Appeal Brief ("App. Br.," filed Jan. 19, 2015); Reply Brief ("Reply Br.," filed July 13, 2015); Examiner's Answer ("Ans.," mailed May 20, 2015); Final Office Action ("Final Act.," mailed Aug. 28, 2014); our Decision on Appeal ("Decision" mailed Oct. 31, 2016); and the original Specification ("Spec.," filed Dec. 29, 2007).

APPELLANT'S ARGUMENTS AND RESPONSE

(1) Legal Standard of Review

With respect to point (1), Appellant argues:

[T]he factual findings of the Honorable Board are reviewed to determine whether they are unsupported by substantial evidence, and the Board's legal conclusions are reviewed for correctness in law . . . [and] upon the standards of the Administrative Procedure Act, Appellants respectfully submit that in the Decision, at least one finding of the Honorable Board appears to be unsupported by substantial evidence

Request 2.

Appellant incorrectly states our burden of proof in *ex parte* proceedings should be analyzed using the substantial evidence standard. *Id.* The Board's decision is the final agency decision on patentability, and thus the Board reviews the fact finding using a ***preponderance of the evidence*** (more likely than not) standard of proof. *In re Caveney*, 761 F.2d 671, 674 (Fed. Cir. 1985) (Other than for fraud or violation of the duty of disclosure, preponderance of the evidence is the standard that must be met by the PTO in making rejections). On judicial review of agency action, administrative findings of fact must be sustained when supported by substantial evidence on the record considered as a whole. *In re Gartside*, 203 F.3d 1305, 1315 (Fed. Cir. 2000). *See also* 5 U.S.C. § 706(2)(E), designating "the *reviewing court*" as the entity that applies the "substantial evidence" standard of court/agency review to agency fact finding under the Administrative Procedure Act (APA). (Emphasis added).⁴

⁴ *See* 5 U.S.C. § 706. Scope of Review: "To the extent necessary to decision and when presented, *the reviewing court* shall decide all relevant

Substantial evidence means, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *see also In re Kotzab*, 217 F.3d 1365, 1369 (Fed. Cir. 2000) ("Substantial evidence is something less than the weight of the evidence but more than a mere scintilla of evidence."). Thus, the "preponderance of the evidence" standard (as applied to appeals reviewed by the Board) is a higher evidentiary standard than the deferential "substantial evidence" standard of review applied by a court reviewing agency fact finding under the APA.

(2) Arguments Allegedly Overlooked or Misapprehended

"Network Interface"

Appellant contends it "attempted a rebuttal of Examiner's arguments of page 3 of the Examiner's Answer by noting the distinction between the claimed 'network interface' and the 'radio receiver' of Minnich." Request 4. Appellant particularly argues the "Examiner's proposed definition of 'interface' excludes any recognition that Appellant's claimed limitation specifically recites a *network* interface." *Id.* (quoting Reply Br. 4)

Appellant further contends the Board did not consider:

[Appellant's] evidence introduced in the Appeal Brief as to the proper definition of 'network interface' in respect to several

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be – . . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." (Emphasis added).

commonly utilized sources of information. This evidence went un rebutted in the Examiner's Answer, but the Honorable Board elected to not consider this evidence based upon the notion as noted at footnote 4 of page 6 of the Decision that such evidence was inappropriately introduced in the Reply Brief.

As can be seen, however, such evidence was introduced not in the Reply Brief but the Appeal Brief.

Request 5.

First, we reiterate that we agree with the Examiner's broad but reasonable interpretation (BRI) and finding that Minnich's radio receiver interface teaches or at least suggests the recited "network interface" (Decision 5, Ans. 4; Final Act. 2–4), because the disputed claim limitation is not defined in Appellant's Specification, nor has Appellant pointed to any persuasive evidence of record that would support their desired narrower construction. Ans. 3.⁵

Upon further review, we acknowledge footnote 4 of our Decision incorrectly characterizes Appellant's references to www.inetdaemon.com, Wikipedia, and www.docs.oracle.com, provided in note 2 of the Appeal Brief, as having been originally presented in Appellant's Reply Brief.

However, for purposes of this Request, we have fully considered the citations in the Appeal Brief (n.2), and do not find these references persuasive in overcoming the Examiner's broad but reasonable interpretation of the disputed "network interface" limitation because Appellant's citations

⁵ Appellant points to Specification paragraphs 13, 18, and Figure 1 (without specific identification of any element) as allegedly providing written description support for the claim limitation containing the recited "network interface." App. Br. 2. We find no disclosure in the cited portions or any other portions of the original Specification and Drawings of *any* "interface," and further note the contested limitation is not present in the originally-presented claims.

do not represent dictionary definitions or otherwise limiting definitions of a "network interface," and also because these references do not preclude the Examiner's broad but reasonable interpretation, particularly in light of Appellant's Specification. Moreover, Appellant does not point to or otherwise provide persuasive evidence or argument that the Examiner's interpretation is overly broad, unreasonable, or inconsistent with Appellant's Specification.⁶

Accordingly, based on the findings above, on this record, we are not persuaded of error in the Examiner's reliance on the combination of Minnich and Meek to teach or suggest the contested limitation of claim 1, nor do we find error in the Examiner's resulting legal conclusion of obviousness.

CONCLUSION

For the aforementioned reasons, Appellant's contentions have not persuaded us of substantive error in our October 31, 2016 Decision.

Accordingly, we have granted Appellant's Request for Rehearing to the extent that we have reconsidered our Decision, however, Appellant's Request is denied with respect to making any changes to the ultimate outcome of our Decision on the rejections on appeal addressed therein.

DECISION

We have considered all the arguments raised by Appellant in the Request, but Appellant has not persuaded us that we misapprehended or

⁶ We find Appellant's assertions amount to unsupported attorney argument, and therefore we give them little weight. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see also In re Huang*, 100 F.3d 135, 139–140 (Fed. Cir. 1996). Therefore, we do not find error in the Examiner's reliance on the combined teachings and suggestions of Minnich and Meek.

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overlooked any points in rendering our Decision such that we decline to change or modify our prior Decision for the reasons discussed, *supra*.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED